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The Recording Laws of the United States

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PAPER

READ BY

THOMAS M. COOLEY.

The Recording Laws of the United States.

Of the securities provided by law for the protection of property, perhaps none is more important than the registration of land titles. We put aside, very early, the old English notion that the best evidence of title was the possession of the title deeds, and adopted a system which, in theory, proposed to place in a public office, accessible to every one, a record of the titles to real estate, by which every man might safely buy or safely accept encumbrances. Speaking generally now of the system, the theory seems to be nearly perfect. Every instrument affecting the title to lands must be executed in the presence of a public officer, who is empowered by law to authenticate the act, and it is only on his certificate, given after the observance of all due formalities, that the instrument can go upon record. The record is made up by another public officer, who is permitted to record nothing which is defective, and who shall carefully note the day, hour, and minute when any instrument is presented for record. To insure the prompt recording, the grantee or encumbrancee is notified that his unrecorded instrument shall be invalid as against any subsequent deed or encumbrance which a *bona fide* taker may receive from the same party, and place first upon record; and as this penalty seems to render it reasonably sure that there will be no needless delay, it is supposed the record will show the actual condition of the title, except in

cases of gross neglect. Those cases the law declines to provide for; assuming that it is better that parties failing to record their titles shall run all risks of loss, than that the public record shall be an unsafe reliance. We therefore find this record generally trusted, as if it were something almost infallible; and titles are bought and mortgages taken in reliance upon the mere certificate of the recorder that the grantor or mortgagor is owner.

It is nevertheless well understood that it is impossible such records should be an entirely safe reliance, because many things that may affect a title either cannot be shown by them under any circumstances, or cannot be shown under any provisions of law as yet made for the purpose. Heirship is one of these. If the apparent owner of the record title dies, whoever purchases of his supposed heirs must run all risks of error or misinformation in learning who they are. Provision has indeed been made in a few of the states for recording a certificate of the heirship from the court having jurisdiction of the estate of decedents, but these provisions are exceptional, and the certificate would of course be ineffectual to cut off the right of an actual heir, unless given under provisions of law which require a judicial hearing and determination, after notice to all concerned. Questions of marital right in lands are also not to be settled by a mere inspection of a record; and not to mention other things which might defeat an apparently good title, it is sufficient for our present purpose to say that any deed in the chain of title may prove to be incorrectly recorded* or be forged, or be given

* The question upon whom the law shall fall if one is misled by relying upon a record which is incorrectly made, is one on which there are varying decisions; the different conclusions being reached on differences in the recording law. That a deed duly executed and left for record by the grantee is constructive notice to subsequent purchasers, encumbrancers, and creditors, notwithstanding errors in recording it, see *Merrick vs. Wallace*, 19 Ill. 486; *Polk vs. Cosgrove*, 4 Biss. 437; *Riggs vs. Boylan*, 4 Biss. 445; *Mims vs. Mims*, 35 Ala. 23. That the record is notice, though not indexed, see *Bishop vs. Schneider*, 46 Mo. 472; *Garrard vs. Davis*, 53 Mo. 322; *Curtis vs. Lyman*, 24 Vt. 338. But the following cases hold that if errors occur in recording, the record is notice

by a minor, and therefore voidable; or by an insane person, and therefore wholly void. The record, then, instead of being a safe reliance, is a mere convenience, by the aid of which we may perhaps, on proper inquiry, discover where and what the title is.

But our purpose in this paper is to call attention, not to those things in respect to which the record comes short of furnishing the full information for which the general public looks to it, but to positive faults of the recording laws, which render the records convenient instruments of fraud and robbery. In doing this, we concede the great advantages to be derived from a registration of titles, but we affirm that the statutes contain defective, misleading, and dangerous statutory provisions, and that these invite a lax administration of other provisions which are not improper in themselves, but only become so in the manner of execution.

The most conspicuous feature of the prevailing system is, that conveyances shall be certified for record by a public officer, duly commissioned and empowered for the purpose, who shall in person supervise the execution and receive the acknowledgment of grantors that they have freely signed and executed the instruments to which their names are appended. This certificate authenticates the conveyance for record, and when nothing appears on the face of the instrument to contradict it, is evidence of due and free execution in accordance with the provisions of law. In the common understanding of the term, the official act of taking and certifying an acknowledgment would be called ministerial, rather than judicial; for it is not supposed there are any adverse parties, and the officer is to decide

only of what appears on its face. *Frost vs. Beekman*, 1 Johns. Ch. 288; *Beekman vs. Frost*, 18 Johns. 544; *N. Y. Life Ins. Co. vs. White*, 17 N. Y. 469; *Sanger vs. Craigie*, 10 Vt. 555; *Baldwin vs. Marshall*, 2 Humph. 116; *Lally vs. Holland*, 1 Swan. 396; *Shepherd vs. Burkhalter*, 13 Geo. 443; *Chamberlain vs. Bell*, 7 Cal. 292; *Barnard vs. Campau*, 29 Mich. 162; *Jennings vs. Wood*, 20 Ohio, 261; *Scoles vs. Wilsey*, 11 Iowa, 261; *Parret vs. Shaubhut*, 5 Minn. 323; *Brydon vs. Campbell*, 40 Md. 331; *Terrell vs. Andrew County*, 44 Mo. 309; *Gilchrist vs. Gough*, 63 Ind. 576. That an indexing is essential, see *Miller vs. Bradford*, 12 Iowa, 14; *Speer vs. Evans*, 47 Penn. St. 141.

upon nothing but formalities; but in its effect, the act has many of the qualities of a judgment, for it determines, *prima facie* at least, that the conveyance is the genuine deed of the party purporting to execute it; and, if in fact, the nominal grantor is personated by another, as he may be, the acknowledging officer may by his certificate *prima facie* deprive the real owner of his title. There may consequently be adversary parties when an acknowledgment is to be taken; the pretended owner, who is not such in fact, and the real owner, who is being personated for fraudulent purposes; and the certificate of acknowledgment is a decision between them, which in many cases it will be impossible to overcome. Moreover, in some cases, the officer is required to see that the instrument is not executed under compulsion, and in those cases the law supposes that there may be persons operating to compel a conveyance by duress, and it places the officer between them and the grantor for the purposes of protection. It is not inaccurate, therefore, to say that the act of certification is at least *quasi* judicial.*

* The authorities generally say, that an officer in taking the acknowledgment of a deed acts judicially, and that in the absence of a showing of fraud or duress, his certificate is conclusive. *Louden vs. Blythe*, 27 Penn. St. 22; *Hall vs. Patterson*, 51 Penn. St. 289; *Heeter vs. Glasgow*, 79 Penn. St. 79; *Singer Manuf. Co. vs. Rook*, 84 Penn. St. 442; *O'Ferrall vs. Simplot*, 4 Greene, Iowa, 162; *Graham vs. Anderson*, 42 Ill. 514; *Hill vs. Bacon*, 43 Ill. 477; *Calumet, &c., Co. vs. Russell*, 68 Ill. 426; *Russell vs. Baptist Union*, 73 Ill. 337; *Johnston vs. Wallace*, 53 Miss. 331; *Harpending vs. Wylie*, 14 Bush. 330. In *Graham vs. Anderson*, *supra*, in which a married woman whose name appeared to a deed undertook to prove that she was never privately examined as required by law, Ch. J. Breese said: "We have examined the authorities on this point, and we think where the certificate of the privy examination of a married woman is in the form required by statute, it is not sufficient, in order to impeach it, to allege that she did not acknowledge the deed as her act and deed; that she did not release her homestead right. There must be some allegation of fraud or imposition practised toward her; some fraudulent combination between the parties interested and the officer taking the acknowledgment." Citing *Ridgeley vs. Howard*, 3 Har. & McH. 321; *Jamison vs. Jamison*, 3 Whart. 457; *Hartley vs. Frosh*, 6 Texas, 208. In other cases it has been said, that to avoid the certificate of acknowledgment, there must be fraud with which the grantee is connected: *Baldwin vs. Snowden*, 11 Ohio St.

Now, when the great extent of some of our states is borne in mind, and the vast number of transactions in real estate which are constantly taking place, we shall probably concede that the function of certifying conveyances so that they shall go upon record and import verity, is among the most important and responsible which the statutes confer upon any officials; and inasmuch as adversary parties are not expected to supervise their proceedings, common prudence would dictate that the authority be conferred upon such only as are carefully selected for their wisdom, integrity, and prudence. Indeed, care is even more important here than in the selection of judicial officers proper; for the latter must exercise their authority in public, with adversary parties watching their proceedings, and under provisions of law for the public correction of their errors. Naturally, therefore, we should expect to find in the statutes provisions for the careful selection of a small number of certifying officers, and which should require them to exercise their authority with circumspection, and to give their certificates only after they have made sure they will accord with the fact. The undoubted fact is, however, that in many of our states almost

203; *White vs. Graves*, 107 Mass. 325; a *bona fide* purchaser being protected even in case of fraud. *Hall vs. Pattison*, 51 Penn. St. 289. We should say this statement is somewhat too broad. An officer cannot bind by his certificate a party who has never appeared before him at all. See *Barnet vs. Barnet*, 15 Serg. & R. 72; *Michener vs. Cavender*, 38 Penn. St. 334; *Watson vs. Thurber*, 11 Mich. 457; *Fisher vs. Meister*, 24 Mich. 447; and it may always be shown that at the time he had by law no authority to perform the act. *Eaton vs. Woydt*, 32 Wis. 277. But unquestionably a very clear case must be made out before the certificate can be set aside. *Hourtienne vs. Schnoor*, 33 Mich. 274; and the party's own evidence is not sufficient for this purpose. *Lickmon vs. Harding*, 65 Ill. 505. A party may also be estopped by knowingly permitting a false certificate to be acted upon by a purchaser. *Norton vs. Nichols*, 35 Mich. 148; *McNeeley vs. Rucker*, 6 Blachf. 391. See further, for the general principle, *Swift vs. Castle*, 23 Ill. 242; *Eyster vs. Hathaway*, 50 Ill. 521. These cases, when examined, will illustrate the heedlessness with which certificates of acknowledgment are given. The requirement in some states that a married woman should be examined separate and apart from her husband, and the contents of the deed be made known to her, was one which many acknowledging officers seldom obeyed in its spirit.

any one may have this important official authority who feels disposed to ask for it ; and that ignorant men, and men notoriously untrustworthy do often possess it. One reason why this is so is that the statutes have been framed with a view to make the transmission of title to lands easy, cheap, and simple, so that land may be dealt in with the same facility as horses, or any species of personalty. But another reason is that a great number of officers, elected or appointed for other purposes, have had the power to certify the acknowledgment of deeds added to their other functions, as if it were a secondary and unimportant matter. The fact is especially prominent in the states of the west.

To a proper appreciation of the resulting evils, it is necessary that some of the statutory provisions be given ; and those of Wisconsin are selected, not because they are worst,* but because they are fairly representative of provisions existing generally, and will serve as well as any to indicate the defects in the general American system.

1. If we look in these statutes to see who may certify to the execution of conveyances, we are struck at once with the enormous number. Any judge or clerk of a court of record, court commissioner, county clerk, notary public, or justice of the peace may perform this important ceremony. The people of Wisconsin framed their institutions under the conviction that it was of primary importance that cheap justice be brought to every man's door ; and they therefore provided for four courts in every town, to be held by as many justices of the peace. These are chosen by the electors of the towns, and the number is the same where the electors are few as where they are numerous. It is estimated that there are in the state, in all, not less than 4,800. Notaries public are appointed by the governor. They are state officers, and perhaps in providing for them it was supposed the number would be small, but it is not

* They are in substance the same as those of Michigan, and in some particulars better than those of some other states.

limited by the constitution or the statutes, and, in fact, nearly every person receives the appointment who desires it. Lawyers obtain it for themselves or their clerks, for convenience in executing papers and administering oaths, and the office is so common that many persons perform the official duties without expecting to demand or be offered the official fees. The whole number of notaries in the state is about 4,000. Leaving the other enumerated officers out of view, there are, therefore, in the state 8,800 justices and notaries, whose certificate to the execution of a deed or mortgage entitles it to go upon record. That is equivalent to saying, as we shall show further on, that there are in the State of Wisconsin 8,800 persons whose mere certificate, executed according to certain forms, may deprive any man in the state of his homestead or other real property.

If these men were all selected for this important service for their integrity, there might be a reasonable feeling of reliance on it being performed honestly; but the exact fact is that they select themselves. Unless the executive of Wisconsin is more particular than those of most western states, he seldom refuses the request for a notary's commission.*

And it is notorious that in most towns any man may be a justice of the peace who can succeed in manipulating, in his own interest, the town caucus of the party in majority. To suppose that there are not, in this vast number of officers, many who would not scruple to certify to a false deed if they believed they could do so with impunity, is to put a faith in human nature which experience does not justify. Nothing is easier, and nothing is safer; and we have no right to be surprised when we find unscrupulous sharpers resorting to fraudulent dealings in land, in full confidence that they are less exposed to risks than by the better known frauds and robberies.

* Instances might be here mentioned of attorneys disbarred for dishonesty, who nevertheless were permitted to hold the office of notary public, and the fact attracted no particular attention; the office being generally looked upon as unimportant.

2. But having provided for this great number of certifying officers, the law has made no provisions whatever for insuring the intelligent and honest discharge of their duty. When the executed deed imports verity, the most natural shape for fraud to assume would perhaps be that of false personation; and this is one which requires to be guarded against with great care. It may safely be assumed that the large majority of all justices and notaries are men of integrity; but the most honest men are frequently unsuspicious and credulous to the last degree, and never look for fraud or deception from others until they actually experience it. It is therefore of great importance that the law should make careful provisions for putting them upon their guard, and should either forbid their taking the acknowledgments of persons they do not know, or should require them to take evidence of identity from those they are acquainted with, and make some record of the evidence which may be resorted to in case of alleged fraud. But the law makes no such provision. The statute does indeed give a form of certificate, in which it is recited that the persons executing the deed are known to the certifying officer, and it provides that the certificate shall be sufficient if "substantially" in that form. But we are not aware that it has ever been held that the absence of such a recital would render the certificate ineffectual; and if the certificate must always contain it, the recital is an idle form, for it is never understood that the authority to take acknowledgments is limited to the cases of those the officer is personally acquainted with. The authority is general, but as the certificate covers the identity of the party, it is assumed that the officer will satisfy himself on that point before certifying. But how shall he satisfy himself? Shall he take the word of the party himself as sufficient? If so, the inquiry is idle, for the offer of the deed for certification is an assertion of identity. Or shall he accept the statement of any other person who may be brought to him as a witness, whether known or unknown? If so, all that is needed is that the fraudulent

grantor shall have a confederate to vouch for him, or be able to find some one sufficiently credulous to accept and repeat his statement, that he is the person he represents himself to be.*

But the truth is, that so unimportant and so much a matter of mere form is the certificate of acknowledgment supposed to be, that most officers certify without doubt or question for any one who presents a conveyance for the purpose; so that if any one in this assembly were to go as an entire stranger into the office of a justice or notary in Wisconsin, and offer to acknowledge the execution of a deed, the probabilities are that the acknowledgment would be taken without question, and that the officer would certify according to the form given in the statute that the grantor was personally known to him. A fraudulent personation, therefore, requires no assistance from the officer, except that degree of carelessness which with many is habitual. No doubt there are a great many officers who duly appreciate the importance of their functions, and are careful to certify to nothing they do not know; but there are enough of a different sort to render false personation easy and safe.

3. Deeds of land in Wisconsin are recorded in the county within whose limits the lands lie, and the recorder must place none upon record unless it appears to be executed in compliance with the statutory provisions. His recording a deed is therefore equivalent to a decision by him that the certificate comes from the proper source, and he is supposed to satisfy himself of this fact. Now the means he has of doing this is an inspection of the instrument; the law provides for no other.

Some of the officers mentioned in the statutes have official seals, and it is presumed their certificates will be given under them, and that the recorder will be acquainted with the seals. The signatures of some it is presumed will be generally known;

* An introduction of the party to the officer by some one the officer knows is held sufficient. *Nipple vs. Hammond*, 4 Colorado, 211. Doe may therefore introduce himself to Roe, and procure Roe to introduce him to Jackson, the officer.

as, for example, those of the justices of the Supreme Court. But justices of the peace have no official seal, and notaries public may have none; and while the recorder may know the handwriting of some of these officers, it is not likely that he will know so well that of any great number as to be able to distinguish between the genuine signature and a clever imitation. Of course no assumption could be more wild and absurd than that the recorder knows the handwriting of every justice and notary in the state, and is able on an inspection of a signature to distinguish immediately between the genuine and the false. Indeed, he has no means of even knowing who all the justices and notaries of the state are. And yet the law not only requires him to take official notice who they all are, and official notice of the genuine handwriting of them all, but it gives a peculiar force to his decisions upon these points; so that his acting upon his supposed knowledge—which in fact he does not and cannot possess—imparts record verity to the instrument acted upon. It is thought sometimes to be a hard rule which requires every man, at his peril, to know the law; but what shall we say of the amazing assumption that the recorder of deeds knows all the acknowledging officers of the state, and can recognize the genuine signatures of all?

The system is a direct and very tempting invitation to fraud and forgery. Any man with average facility in handling a pen may put upon record an apparently good title under it. If all he cares for is to obtain in himself or in some confederate a title which he can dispose of, he need not trouble himself to see that the name he puts to the certificate of acknowledgment is that of an actual officer, for that will be assumed by the recorder and by a purchaser. But if he desires to obtain a record title that will stand the test of litigation, the name of a real justice or notary will be employed, so that the record may not be defeated by the evidence that there is no such acknowledging officer as the deed assumes. A sharp rogue will make use of the name of some officer who transacts a large business, because such a person, if his supposed act was called in question,

would seldom be able to testify whether he did or did not take the acknowledgment of any particular conveyance. It will be easy to inquire out such officers who notoriously perform the official act in the most careless and perfunctory manner.

Of what real value, then, can be the certificate of a justice or notary that a conveyance has been duly acknowledged before him by the grantor named therein? The moral force of such a certificate is absolutely nothing, unless we happen to know the officer to be a man uncommonly conscientious and careful, or unless we have reason to believe that the grantor was personally known to him. Imagine a statute passed which should require bank checks and drafts, and their endorsement, to be thus acknowledged. What prudent banker would deem it safe to receive the certificates without question, as recorders now receive the certificates to conveyances? And how long would he escape bankruptcy if he were to do so? And would not any prudent man say, without hesitation, that the act of paying a draft in reliance upon the certificate of an unknown person, who might either be dishonest and the confederate of a forger, or so credulous as to be the ready tool of a forger, would be one of such gross and inexcusable carelessness that, if it were habitual, it ought to deprive him of the confidence of the public in his business capacity? But the want of prudence would become absolute recklessness if, without the means of determining whether the certificate itself was genuine or forged, he nevertheless acted in reliance upon it.

Observation of the working of registration laws for many years has satisfied us that the requirement of an acknowledgment of conveyances under such laws is no security to titles whatever, and that the community would scarcely be more exposed to frauds if every grantor was at liberty to execute and record his conveyance without any such ceremony. Such security as there is must be found now, first, in the laws for the punishment of forgery, and second, in the difficulty of disposing of a false title without leaving tracks by which the perpetrators may be traced. But the laws against forgery would

be equally available then as now, and the benefit in requiring an acknowledgment is in the main limited to the fact that a person must be named as acknowledging officer, who, if he acted as such, can presumably give important evidence when the deed is a fraud. But any reliance upon such evidence must fail whenever an officer, from the multiplicity of his transactions, would fail to remember whether a particular transaction did or did not take place. And if the fact of fraud can be put beyond the reach of evidence by the destruction of deeds, as in many cases it can be, the difficulty in dealing with the title will disappear altogether.

The facilities for the manufacture of false titles are increased by the provision that deeds not acknowledged by the grantor may be proved before an acknowledging officer and certified by him for record on such proof. The statute does not require the proofs to be certified, and it is judicially determined that a certificate of a justice that the deed was proved to his satisfaction is sufficient.*

Like facilities are afforded for the manufacture of false titles out of the state. A notary public anywhere in the civilized world may take the acknowledgment of a deed of lands in Wisconsin, and his official seal sufficiently authenticates his signature. Thus the statutes of Wisconsin place the titles of its people at the mercy of this class of officers the world over. If they are dishonest, they may purposely take away titles by false certificates; if they are merely careless in the performance of official duties, they may heedlessly permit others to obtain false certificates from them. It almost seems as if the laws of the state were intended to invite unscrupulous persons of every land to come forward and steal the lands of her citizens.

But it may be said and believed that there can seldom be danger that a manufactured title will escape detection. The supposed grantor will always know when a deed is fraudulent or forged, and he may testify in his own protection. The law

* *Myrick vs. McMillan*, 13 Wis. 188.

also requires two witnesses to every conveyance ; so that, with the acknowledging officer—unless all these are fictitious—there must always be three persons who knew of the transaction if it was real, or who presumably might testify to the fraud if the deed was forged. The deed itself, also, unless in cases of remarkably successful imitations, must, from the number of signatures upon it, afford abundant opportunity for detection.

This reasoning would be sound if a fraudulent deed was likely to be kept and produced in evidence ; but it is not. The same statute that invites parties to commit frauds, takes care to provide the means whereby they may escape detection. It therefore provides that when conveyances have been acknowledged or proved and recorded, “ the record, or transcript of the record, certified by the register in whose office the same may have been recorded, may be read in evidence in any court within this state, without further proof thereof.” Thus the record, or a transcript of the record, is made original evidence. With such a law in force, the manufacturer of a fraudulent title, or any one claiming under it with knowledge of the facts, will no more keep the false papers where they may be discovered and given in evidence against him, with their forgeries upon their face, than a murderer would keep by him the instruments of his crime, with all their marks and stains. All he needs is the record, and the false story which that will tell will wear the bold face of truth, when the original itself would not for a moment stand the test of inspection.

Let us see, then, how successive falsehoods may become verities under the recording laws. A false assertion from an unknown person obtains a false certificate from a notary ; the false certificate secures from the recorder the record of a forged deed, which the record then affirms to be genuine, and this false affirmation is then received as true in all courts, “ without further proof thereof.” Or a forger presents to the recorder a conveyance, wholly manufactured by himself, and the recorder, by putting it upon record without investigation or inquiry, makes it testify to all the world that it is a genuine instrument,

and was executed by and in the presence of the persons whose names appear upon it. It is true that the statute provides that "the effect of such evidence may be rebutted by other competent testimony," but the effect nevertheless is that the forgery proves its own verity, and the owner of the land must lose his title, if he cannot disprove it. And in entering upon the proof of a negative, he will do so under the disadvantage that he must meet and overcome by parol evidence the record of a formal document, which is officially certified to have been executed and acknowledged by him in the presence of witnesses.*

But one proposing to manufacture fraudulent deeds will not do so recklessly, but will cunningly lookabout for cases in which, when the deeds are recorded, it will in his opinion be practically impossible to overcome the evidence of verity which the record gives. The death of a land owner often affords opportunity to manufacture a conveyance with impunity. If he has attended to his ordinary affairs until shortly before his death, a deed dated during that period may excite no suspicion, and with the assistance of a dishonest notary, or one careless enough to permit of a personation, it may easily be prepared. If a notary or justice, who might have been likely to be called upon by the owner of the land, should chance to die near the same time, this would afford an excellent opportunity for the use of his official signature with impunity, and the manufacturer of the deed might do everything essential to complete the work without any assistance whatever. If the owner of the land should be stricken with incurable mental disease, the opportunity to rob his estate of his lands would be the same that would be presented by his death. It is not so common to record deeds promptly on their execution, that the fact that a short time, or even some months, intervenes between the date of the deed and of the record will excite suspicion, and it is only necessary that,

* A certificate of acknowledgment is not invalidated by the fact that the grantor or the acknowledging officer does not recollect the transaction. *Tooker vs. Sloan*, 30 N. J. Eq. 394. See *Sisters, etc., vs. Catholic Bishop*, 86 Ill. 171.

after the record is made, the parties concerned should be able to give some plausible account of the loss or destruction of the deed, and the fraud is accomplished. A plausible story is easily made up if some little time elapses before the deed comes to the knowledge of the real owner. In fact, it is notorious that very little care is taken by large numbers of people to preserve their title deeds after they have been recorded, and any one who has had occasion, because of trouble with the records, to look up original conveyances, knows perfectly well that while grantors, after parting with their title, often take no pains to preserve old deeds, which now seem worthless to them, grantees are quite as likely not to take pains to obtain and keep them. The loss of old deeds is therefore not an unusual, but a very common occurrence.

In looking for land to appropriate, the land robber will be likely to come across cases in which, on the death of the owner, it is manifest the knowledge of his ownership has not immediately been brought home to the heirs. Such instances generally happen in the case of non-residents. A large proportion of the community never make inventory of their property, and if they attend in person to their own affairs, they may have lands abroad of which their families have but faint information, and sometimes none at all. Very many of the tax titles in the western states originate in the fact that for a time after the death of the owner the lands are not looked after, either for lack of information on the part of those interested, or because the family are infants and women, and their affairs pass to the hands of some one who was a stranger to the business of the ancestor, and only slowly possesses himself of a knowledge of the facts. During this period there is opportunity for a fraudulent harvest, and when the representatives of the deceased at last inquire out the lands, they find that apparently the ancestor disposed of them in his lifetime, and the inquiry goes no further.

The parties who engage in such frauds usually profess to be real estate brokers or abstract makers, and their business

affords them the opportunity to know what cases it is safe to deal with. To carry on frauds on a large scale, confederates are required, and several transfers may be desirable. And the fraudulent dealings will by no means be confined to the cases of death or disability of the owner. Those are generally the safer cases ; but many non-resident owners of land in the western states have never visited them, and if false deeds were placed upon record, only a fortunate accident would be likely to acquaint them with the fact.

Fraudulent deeds are sometimes obtained by a species of false personation, which all parties concerned appear to think may be indulged in without danger. For example, Mr. William Jones, of Wisconsin, many years since purchased of the United States a certain quarter section of land, and there is no conveyance of it by him of record. Another Mr. William Jones, of Milwaukee, receives a letter from a land agent, enclosing ten dollars and a quit claim of this land, which he is requested to execute. He does not perceive what good the quit claim can do any one ; but, confident it cannot hurt him to consent, he gives the conveyance and accepts the money. Now the deed of quit claim in common use in the western states is really a deed of bargain and sale, and just as effectual in transferring the title as the common deed with covenants. And in several states it has been decided that no suspicion attaches to a title by reason of its having been transferred by a quit claim.* The land agent, therefore, soon disposes of the land to a *bona fide* purchaser, whose title is apparently good and may never be disproved.

One other fraud, of which cases have come before the courts, may be mentioned. Very generally in this country it is now provided that a homestead shall only be conveyed by the joint

* See *McConnell vs. Reed*, 4 Scam. 117 ; *Butterfield vs. Smith*, 11 Ill. 485 ; *Pettingill vs. Devin*, 35 Iowa, 344 ; *Burns vs. Berry*, 42 Mich. 176 ; *Morris vs. Daniels*, 35 Ohio (N. S.), 406 ; *Taylor vs. Harrison*, 47 Texas, 454. But see also *Marshall vs. Roberts*, 18 Minn. 405 ; *Hutchinson vs. Hartmann*, 15 Kan. 133.

deed of husband and wife. A husband, whose wife by his misconduct has been driven from his home, has been known to procure an abandoned woman to personate her for the purposes of this conveyance; and when, after the husband's death, she attempted to claim homestead rights, this deed, certified in due form by a public officer to have been executed by herself, confronted her. In case she had died before the husband, and the minor children had claimed the homestead, the fraud would have been likely to be completely effectual.

We have said that unoccupied lands will generally be selected for fraudulent conveyances, because the probabilities of concealing the fraud will be greater. But it should be observed that even in the case of occupied lands, the difficulty of protecting against fraud is increased by the recording laws. One or two illustrations of this fact will be given. The statutes of Massachusetts provide that unrecorded conveyances shall be valid only as against the grantor, his heirs and devisees, and other persons having *actual notice* thereof; and it is judicially determined that possession of lands by an owner whose deed is unrecorded is not actual notice of his deed, and he is consequently liable to be disseized under a subsequent deed from his grantor.* It has also been held in many cases that possession of lands is no notice of a claim to title or equities against the possessor's own conveyance;† so that a fraudulent deed, which the record makes *prima facie* genuine, may take from the real owner all the protection which possession is supposed to give. And though possibly the case never occurred of the owner being disseized under the record of a forged conveyance purport-

* *Pomroy vs. Stevens*, 11 Met. 244; *Parker vs. Osgood*, 3 Allen, 487; *Dooley vs. Walcott*, 4 Allen, 400; *George vs. Kent*, 7 Allen, 16; *Sibley vs. Leffingwell*, 8 Allen, 584; *Mara vs. Pierce*, 9 Gray, 306; *Lamb vs. Pierce*, 113 Mass. 72. Compare *Vaughan vs. Tracey*, 22 Mo. 415, and 25 Mo. 318; *Rhodes vs. Outcalt*, 48 Mo. 367; *Harris vs. Arnold*, 1 R. I. 126.

† That possession is not notice of equities as against a man's own conveyance, see *Williamson vs. Brown*, 15 N. Y. 354; *Fassett vs. Smith*, 23 N. Y. 252; *Bloomer vs. Henderson*, 8 Mich. 395; *Van Keuren vs. Central R. R. Co.*, 38 N. J. L. 165; *Denton vs. White*, 26 Wis. 679.

ing to be his own, the same cannot be said of heirs. Death can be wonderfully efficient as an assistant to fraud when the recording laws kindly dispense with the production of original documents.

As our remarks have had special reference to the laws of Wisconsin, it is proper to say that in one particular they are much less subject to criticism than some others. We refer now to the provisions respecting the execution of deeds in other states. They may be acknowledged in other states before any justice of the peace; but the official character and signature of the justice must be authenticated by the certificate of the clerk of a court of record for the proper county, under his official seal. But in quite a number of the states no authentication whatever of the assumed official character or signature is required, but the recorder is supposed to know these officers and their handwriting the country over.

We shall, of course, not be understood as advancing the proposition that all fraudulent dealings in land titles are chargeable to the facilities afforded by the recording laws. We understand perfectly that there may be frauds and forgeries under any system. But what we affirm, and have sought to point out, is that the recording laws afford facilities for the perpetration of frauds that could not otherwise be committed; and that they aid in the concealment of frauds by inviting the destruction of documents that might expose them.

When we become accustomed to a system that, so far as we know, generally works well, and from which neither we nor any of our neighbors or friends have ever suffered, we are not likely to stop to investigate its possibilities, even when, if we were to consider it as a system only as yet proposed, we might reject it without delay or hesitation as fraught with manifest evils and dangers. Suppose it were now proposed that the certificate of any justice or notary in the country should be *prima facie* evidence of the due execution of a will, and that on its being recorded, the record should be original evidence; would not the proposition excite amazement, and be rejected sponta-

neously as in the last degree dangerous? But the certificate of an unknown justice or notary, or of some other unknown person who may falsely assume the officer's name and title, ought no more to authenticate one instrument than another. There is no more to be attested in the case of a will than of a deed. Identity, legal capacity, and freedom of action are all covered by the certificate of acknowledgment, and these are all that a subscribing witness to a will is expected to observe or testify to.

Are there available remedies for these evils? We reply without hesitation in the affirmative. These may be either partial or thorough, and they may be found either in a modification of the existing system of registration, or in the substitution of a better and safer one.

1. A partial remedy would be found in the repeal of all provisions of law which make the record, as we now have it, primary evidence of the genuineness and due execution of a conveyance, and the substitution of others which make it secondary evidence only. This would make it for the interest of every land owner to preserve his title deeds, and of every purchaser to obtain and keep the deeds which are to constitute his muniments of title. Exceptions might be made in favor of recorded instruments under which possession has been held for a time; say for five years; but the general rule ought to be, that the record shall be evidence only after it has been proved that there was a genuine instrument whose non-production is satisfactorily accounted for.*

It would be interesting, if it were practicable, to trace in each state the history of its recording laws, and to ascertain how it was that such force came to be given by law to these records. The real reason is probably to be found in the fact

* In nearly all the states the records are now original evidence. In a few they are evidence only after the party offering them has made affidavit or presented evidence that the original has been lost or destroyed, or is not in his custody or control.

that the early conveyances in colonial times took place with the approval and consent of the government, and were made a matter of solemn record as much as were the laws or the judgments of its courts. Thus, in Rhode Island, the "transfers were made in open town meeting, and if the town approved the sale, they voted to record the deed, which made the conveyance valid; but if they disapproved, the whole was void."* There could be no danger of fraud in making such a record evidence. The Body of Liberties for Massachusetts provided for the recording in the public rolls of the general court of any deed "duly confirmed," and the confirmation might extend to the conveyance or alienation by "any woman that is married, any child under age, idiot, or distracted person," "if passed or ratified by the consent of a general court."† The faith properly due to such records was afterwards transferred without reflection or care to those of another kind which it should have been seen were entitled to little or no confidence.

2. The proposed change will take away some of the temptations to the manufacture of false deeds and their destruction after a false record has been made, but a much more effectual protection will be a requirement that the original deed shall, in every case, be left in the office of registration. This we regard as absolutely indispensable. There can be no effectual security to land titles without it.

For this purpose it should be required, either that all conveyances, mortgages, etc., be executed in duplicate, and the two be presented to the recorder, and one retained by him while the other is returned, with the date of record endorsed; or, if not executed in duplicate, that the recorder, while retaining the original, should deliver back a true copy to the party leaving it. This would give to parties all the security they now have against the loss of evidence by the accidental destruction of the records; a calamity that once occurred in Chicago, and has happened to many counties in different parts of the Union.

* 1 Arnold, *Hist. of R. I.*, p. 120.

† Body of Liberties, 14, 28.

The deeds so left with the recorder might be made the record by being bound up in books for the purpose ; but their liability to wear out in use, and to be fraudulently cut out or defaced would constitute a serious objection. A record for customary use ought, therefore, to be made by copying them into a book, and this book could be indexed and the conveyances abstracted for the purpose of giving certificates of title, as is done now. This system would give a very perfect record, and the original conveyances would always be accessible for the purpose of detecting and preventing fraud or forgery, if any was perpetrated or attempted.

What reasonable objection can there be to this ? We can conceive of none, except the slight additional cost of making duplicate conveyances, or of certifying a copy of the original. This is a mere trifle, when the risks to which land owners are now exposed are considered. The proprietor might, with equal reason, object to the cost of a key to lock his door against burglars. Indeed, the protections of the present system of registration, if it is to be retained, might with almost equal reason be made protections against burglary, and we might leave our dwellings without other security than a certificate of a justice or notary that he had examined the caskets containing jewels and plate, and found them burglar proof. The average officer would probably give the certificate with as little hesitation and as little knowledge as he now gives certificates of acknowledgment.

The cost of the proposed system might be somewhat lessened by entering only an abstract of the conveyances in the record books, instead of a full copy ; but this would be objectionable, because it would be likely to render necessary frequent reference to the original, and subject it to undesirable wear and risk of injury.

There are two subordinate advantages of the proposed system which are of no small value, and deserve to be mentioned.

The first is, that it gives protection against errors in recording. These are very numerous, especially in the new states, where

for a considerable time business is likely to be done loosely. It is astonishing sometimes to see how carelessly the records are made, and how illegibly they are sometimes written. We have ourselves often examined records where it was nearly or quite impossible to determine whether certain characters were intended for "north" or "south," or certain others for "east" or "west," and yet upon these the whole description depended. Registers of deeds, we may as well remember, are not chosen for their handwriting, or because of fitness for the particular office, but for circumstances or qualities which render them important to the general party success. Moreover the litigation that arises respecting mistakes is sufficient to prove that in many cases the copy in the record book is never compared with the original.

The second subordinate advantage is, that it gives additional protection against the theft or destruction of records. As there would seldom be occasion to refer to the originals, it is presumed they would be kept in secure vaults, as much protected as possible against ordinary dangers. Instances have occurred of the stealing of the record books of a county in order to the obtaining of a reward for their re-delivery; just as tombs have sometimes been robbed for the same purpose; but with this difference, that while the body may wisely be left with the thieves, the records must be had back for the protection of the living. It is indeed possible that both record and original may be stolen or tampered with, but the difficulties will be greatly increased.

Will the proposed system be the best that can be devised? We think not; but it will be the best that any American state would now assent to. The best system would be one under which each successive conveyance should represent an actual and undoubted title, subject only to such mortgages or other liens, leases, etc., as would be noted thereon. Something of this nature is now in force in the British colonies of the Southern Hemisphere. And at the time when land titles are first being acquired, it might easily be established. Where land titles are

complicated and confused, as ours now are, it could only be established on a judicial investigation of titles which are questioned, or on some provision which should require a title claimed of record to be contested by judicial proceedings within a short time named, or it should stand confirmed. To sketch the details now of a plan would be idle, for at present the public would not even listen to it with patience. Inherently, however, there should be no more difficulty in such a registration than there is in a similar registration of ships, and when once adopted, purchases and sales can safely be made by it without the risks now attending reliance upon abstracts.

The plan now actually proposed is substantially that of some of the British colonies, and it could be easily adopted in the states without confusion. At the same time, the great number of acknowledging officers ought to be reduced, and some minor changes made; but with the original conveyances preserved, such matters would not be of great importance. If something of the sort is not soon done, it will be because the people do not fully understand and appreciate the dangers to which their titles are now exposed. These dangers are increasing from year to year as the criminal classes come to understand more generally the feast to which they are invited by the deceptive "protections" of the recording laws.